1986

# Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction

Laura Cooper

# Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction

Laura Cooper*

Assume that you are an attorney seeking to determine the statute of limitations applicable in Minnesota to a case with multistate aspects. Perhaps you consult the *Dunnell Minnesota Digest 2d*, which states succinctly: "If a cause of action not arising in this state or accruing to a citizen thereof is barred by the law of another state it is barred here."[1] The encylopedia then states several corollary propositions for multistate cases with different fact patterns and provides numerous case citations in support of the propositions. What the reference unfortunately fails to tell you is that the legal propositions and the cases cited are all based either on a statute repealed in 1977[2] or on a choice of law method discarded by the Minnesota Supreme Court in 1973.[3] What do you do now?

Until recently, determining the statute of limitations applicable to a Minnesota case with multistate contacts was relatively simple. Some questions were resolved by a statute explicitly dealing with multistate statute of limitations problems; other questions were resolved as a matter of common law under the prevailing choice of law methodology. The Minnesota statute, a so-called "borrowing statute,"[4] provided:

---

* Professor of Law, University of Minnesota Law School. The author has served as a consultant to Minnesota attorneys in litigation raising choice of law issues, including a statute of limitations case, Mason v. Spiegel, Inc., 610 F. Supp. 401 (D. Minn. 1985). The author gratefully acknowledges the assistance of her law school classmate and fellow conflicts teacher, Professor James R. Pielemeier of Hamline University School of Law, who reviewed an earlier draft of this article.

1. 11A DUNNELL MINN. DIG. 2D *Limitation of Actions* § 2.05(d) (3d ed. 1978).

2. *See infra* notes 5-7 and accompanying text.

3. The pocket part and supplements also fail to note the repeal of the statute or the common law developments in choice of law.

4. Borrowing statutes principally are designed to avoid the forum shopping that would otherwise be encouraged by application of the traditional rule that statutes of limitations are procedural. *See infra* note 10. If a statute of

> When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued.[5]

In 1977, however, the Minnesota Legislature, following its rejection of a proposed substitute borrowing statute,[6] repealed the existing borrowing statute in its entirety,[7] leaving Minnesota without any statutory provision governing the limitations period for causes of action arising outside the state.

Even when the borrowing statute was in effect, some multistate limitations questions could not be resolved by application of the borrowing statute because the statutory solution was limited to cases in which the facts mirrored its explicit terms. Although the statute directed a Minnesota court to dismiss an action barred in the place where it arose, the statute did not specify what statute would apply, for example, if the limitation period had expired in Minnesota but not in the state where the cause of action arose. In this situation, as in other fact patterns not directly controlled by the borrowing statute, the court had to decide the issue of the applicable statute of limitations as a matter of common law under the prevailing state method for choice of law. Following repeal of the borrowing statute, all multistate limitations questions were subject to Minnesota's common law conflicts approach.

In Minnesota today, multistate limitations questions are

---

limitations is procedural, in the absence of a borrowing statute, a plaintiff whose cause of action is barred in the place where it arose can simply take the action to any state where the plaintiff can obtain jurisdiction over the defendant and where the domestic statute of limitations has not yet expired. *See generally* Vernon, *Statutes of Limitation in the Conflicts of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287, 288-98 (1960). The exception in the former Minnesota borrowing statute (*see infra* text accompanying note 5) for actions owned by a Minnesota plaintiff indicates that the fear of forum shopping, and thus the borrowing statute, were inapplicable if a Minnesota resident brought the action.

5. MINN. STAT. § 541.14 (1976), *repealed by* 1977 MINN. LAWS ch. 187 § 1. Of course, questions of interpretation could arise under the Minnesota borrowing statute (such as determining where a cause of action arose), but by 1977 a well developed body of case law existed to guide attorneys in resolving such issues. See, for example, the cases cited in 11A DUNNELL MINN. DIG. 2D *Limitation of Actions* § 2.05, at 123-24 n.9.

6. S.F. No. 380, 70th Leg., Minn. (1977). The proposed replacement to MINN. STAT. § 541.14 would have provided:

> When a cause of action is barred by lapse of time under the law of another jurisdiction which has the most significant relationship to the question of limitation, the action shall not be maintained in this state.

7. 1977 MINN. LAWS ch. 187 § 1.

governed exclusively by common law. The content of that common law, however, is far from clear. In 1973, the Minnesota Supreme Court revolutionized its choice of law method without giving any indication of how its new approach might affect the selection of applicable limitations periods for multistate cases. This Article defines the problem created in Minnesota by the repeal of the borrowing statute and the common law changes in choice of law methodology, reviews the current national debate on multistate limitations problems, and then suggests ways in which the Minnesota Legislature and Supreme Court might act to resolve the dilemma.

## I. THE PROBLEM

Before 1973, Minnesota followed a traditional approach to the resolution of choice of law issues. Questions of substantive law were controlled by a doctrine known as lex loci.[8] To overgeneralize, the law of the place where the cause of action arose governed substantive issues; the law of the forum governed procedural issues.[9] The distinctive rules for substantive and procedural questions made it necessary to categorize issues as either substantive or procedural. Operating under this traditional approach, courts in Minnesota and elsewhere developed a variety of tests to determine whether a particular statutory limitations period was substantive or procedural.[10]

---

8. Milkovich v. Saari, 295 Minn. 155, 162, 203 N.W.2d 408, 412 (1973) (citing Phelps v. Benson, 252 Minn. 457, 90 N.W.2d 533 (1958)). "Lex loci" is, literally, the "law of the place." BLACK'S LAW DICTIONARY 820 (5th ed. 1979). "The traditional approach to choice of law determines the applicable law by locating territorially the relevant event or thing." R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS 15 (3d ed. 1981).

9. "It is elementary that the *lex loci* governs in all matters relating to the right and the *lex fori* in all matters relating to the remedy." *In re* Estate of Daniel, 208 Minn. 420, 425, 294 N.W. 465, 468 (1940). *See also* G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 133 (3d ed. 1963); RESTATEMENT OF THE CONFLICT OF LAWS § 585 (1934) ("All matters of procedure are governed by the law of the forum.").

10. Statutes of limitation were presumptively categorized as procedural and therefore were governed by the law of the forum. RESTATEMENT OF THE CONFLICT OF LAWS, *supra* note 9, at §§ 603, 604. There were, however, judicially created exceptions to the presumption. *See, e.g.*, Bournias v. Atlantic Maritime Co., 220 F.2d 152, 155 (2d Cir. 1955) (refusing to apply the forum's limitation period if the foreign statute of limitations was " 'directed to the newly created liability [under foreign substantive law] so specifically as to warrant saying that it qualified the right' ") (quoting Maki v. George R. Cooke Co., 124 F.2d 663, 666 (6th Cir.), *cert. denied*, 316 U.S. 686 (1942)); *In re* Estate of Daniel, 208 Minn. 420, 428, 294 N.W. 465, 469 (1940) (demonstrating the specificity of analysis in determining whether the statute of limitations limited the

The reign of the traditional approach ended in Minnesota, at least for questions of substantive law, in 1973, with the landmark decision of *Milkovich v. Saari*.[11] In *Milkovich*, an automobile passenger was injured by the alleged negligence of the driver. Both parties resided in Ontario, Canada; the accident occurred in Minnesota, where the parties had come for a brief visit. Ontario law, under a guest statute, would have precluded recovery in the absence of proof of gross negligence; Minnesota had no guest statute. In attempting to determine whether Minnesota law applied to permit the action to go forward in the absence of an allegation of gross negligence, the Minnesota Supreme Court first reviewed the dramatic changes that had occurred in conflict of laws in other states in the prior decade.[12]

The *Milkovich* majority then announced that Minnesota courts would thereafter resolve conflicts questions by application of Professor Robert Leflar's "better-law approach."[13] Leflar had listed five "choice-influencing considerations" to resolve conflicts questions: (A) predictability of results; (B) maintenance of interstate and international order; (C) simplification of the judicial task; (D) advancement of the forum's governmental interest; and (E) application of the better rule of law.[14] Applying these considerations in *Milkovich*, the court quickly dismissed the first three. First, it thought that predictability of results was relatively unimportant in tort cases because automobile accidents were seldom planned.[15] Second, the court perceived no threat to interstate or international order where the forum state had a substantial connection with

---

right or the remedy); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 12-13 (listing judicially created exceptions to the use of a forum's statute of limitations). *See also* note 39 *infra*.

11. 295 Minn. 155, 203 N.W.2d 408 (1973).

12. The *Milkovich* court noted, for example, that in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the New York Court of Appeals held that when a plaintiff, who was a New York resident, commenced a trip in New York with the defendant, also a New York resident, and was involved in an automobile accident in Ontario, Canada, the plaintiff was entitled to have her claim decided under New York law. *See* 295 Minn. at 158, 203 N.W.2d at 410.

13. 295 Minn. at 164-66, 203 N.W.2d at 413-14.

14. *Id.* at 161, 203 N.W.2d at 412. *See also* R. LEFLAR, AMERICAN CONFLICTS LAW § 105, at 245 (2d ed. 1968). After the Minnesota Supreme Court's decision in *Milkovich*, Leflar restated his approach in R. LEFLAR, AMERICAN CONFLICTS LAW § 96 (3d ed. 1977) and most recently in R. LEFLAR, L. MCDOUGALL, III, R. FELIX, AMERICAN CONFLICTS LAW (4th ed. 1986).

15. 295 Minn. at 161, 170, 203 N.W.2d at 412, 416.

the facts and issues involved. The accident's location in Minnesota and the plaintiff's subsequent hospitalization there for more than one month satisfied the court that sufficient contacts existed.[16] Finally, the court concluded that the desire to simplify the judicial task was irrelevant where the state's judicial system could apply the Ontario guest statute as easily as its own common law rule.[17]

The Minnesota Supreme Court found that the last two factors compelled application of Minnesota law. The court identified Minnesota's governmental interest as twofold. First, it viewed the main governmental interest as that of a "justice-administering state," desiring the application of rules consistent with domestic notions of "fairness and equity."[18] Second, it said that the state had an interest in permitting recovery to assure payment of medical bills incurred in Minnesota as a result of the accident.[19] Finally, the court determined that Minnesota had the "better rule" because the possible reasons for a guest statute which it identified—fear of collusive suits and disapproval of a guest "biting the hand that feeds him"—were un-

16. *Id.* at 170, 203 N.W.2d at 417. Professor Leflar considers one of the functions of the consideration of interstate and international order to be the regulation of forum shopping. R. LEFLAR, AMERICAN CONFLICTS LAW § 107, at 249 (2d ed. 1968). The *Milkovich* majority, however, viewed forum shopping as only a "remote possibility" in automobile cases. 295 Minn. at 161, 203 N.W.2d at 412. The court thus seemed to ignore that in the case before it an Ontario plaintiff had chosen to sue an Ontario defendant in Minnesota although, had the action been brought in Ontario, it would have been dismissed immediately because of failure to allege gross negligence. As Justice Peterson noted in his dissent, "The litigation, indeed, was first initiated by plaintiff in the courts of Ontario and was later commenced in Minnesota as an act of forum shopping." *Id.* at 172, 203 N.W.2d at 418 (Peterson, J., dissenting).

Leflar also explores, within the consideration of maintenance of order, whether the non-forum state's "substantial concern with a problem gives it a real interest in having its law applied, even though the forum state also has an identifiable interest," R. LEFLAR, AMERICAN CONFLICTS LAW § 107, at 248 (2d ed. 1968). He describes this factor as "deference to the primarily concerned state." *Id.* § 107, at 249. The *Milkovich* majority did not consider this aspect of international order. The court did not ask whether Ontario would want its guest statute applied to a case in which an Ontario passenger was injured in Minnesota by an Ontario driver on a short trip which began and was to end in Ontario.

17. 295 Minn. at 170, 203 N.W.2d at 416-17.

18. *Id.* at 170, 203 N.W.2d at 417. Leflar expressed approval of a court's defining its governmental interest as not being limited to the content of the forum's domestic law and as including the court's role as a "repository of justice." R. LEFLAR, AMERICAN CONFLICTS LAW § 109, at 251-52 (2d ed. 1968).

19. 295 Minn. at 170-71, 203 N.W.2d at 417. The court thought the incurring of medical bills a relevant consideration although, in this case, the medical bills had already been paid. *Id.*

persuasive.[20] The court expressed confidence that the judicial system could uncover collusive suits and said that it felt no discomfort in the prospect of guest-host litigation.[21]

In adopting Leflar's choice-influencing considerations as the methodology for resolution of choice of law problems in Minnesota, the supreme court expressed no view on whether Minnesota courts were to use the methodology to resolve procedural as well as substantive problems. *Milkovich*, arising from a guest statute issue, which was unquestionably substantive, did not require the court to address the issue.

The United States Court of Appeals for the Eighth Circuit, applying Minnesota conflicts law in a diversity case, was the first court to confront directly the question whether the methodology of *Milkovich* applies generally to procedural questions and, specifically, to statutes of limitations. In *Cuthbertson v. Uhley*,[22] decided two years after *Milkovich*, a North Dakota resident brought a malpractice action against several Minnesota medical service providers. The Minnesota statute of limitations, if applicable, would have barred the action. If North Dakota law governed, the action would have been timely.

The federal district court dismissed the action after applying the methodology of *Milkovich*; the Eighth Circuit affirmed, but rejected the reasoning of the trial court.[23] Although the Eighth Circuit recognized that it was obligated to follow the conflicts approach of the Minnesota state courts and acknowledged the development embodied in *Milkovich*, it concluded that the court in *Milkovich* intended that case to apply only to conflicts between substantive laws.[24] The court concluded: "When the conflict is between the procedural law, Minnesota follows the general rule that procedural law of the forum ap-

20. *Id.* at 171, 203 N.W.2d at 417. The court did not mention what is perhaps the strongest modern rationale for a guest statute: the desire to limit the liability of insurance carriers. *See* Babcock v. Jackson, 12 N.Y.2d 473, 482-83, 191 N.E.2d 284, 294, 240 N.Y.S.2d 743, 750 (1963).

21. 295 Minn. at 171, 203 N.W.2d at 417. Leflar describes the "better rule" consideration as the "[s]uperiority of one rule of law over another, in terms of socio-economic jurisprudential standards." R. LEFLAR, AMERICAN CONFLICTS LAW § 110, at 254-55 (2d ed. 1968). The Minnesota court's summary disposal of its speculative reasons supporting the existence of a guest statute does not appear to be an examination under "socio-economic jurisprudential standards."

22. 509 F.2d 225 (8th Cir. 1975).

23. *Id.* at 226 (unpublished decision of the United States District Court for the District of Minnesota).

24. 509 F.2d at 226.

plies and that statutes of limitations are procedural."[25]

As authority for this proposition, the Eighth Circuit cited a series of Minnesota cases predating *Milkovich*, the Second Restatement of Conflicts (which has never been adopted as the law of Minnesota), and a treatise by Leflar.[26] Although Leflar does describe the traditional rule in the pages cited by the court, he elsewhere makes clear that under his approach—the one actually adopted in *Milkovich*—"[r]ules asserted to be procedural for conflicts purposes ought to be analyzed, in their factual contexts, in terms of the relevant choice-influencing considerations, just as rigorously as other rules of law are analyzed in their own contexts."[27] In short, the Eighth Circuit in *Cuthbertson* concluded that Minnesota's choice-influencing considerations did not apply to procedural questions in general and to analysis of limitations questions in particular, despite the total absence of any relevant Minnesota authority to support its conclusion.[28]

It was not until 1983 that the Minnesota Supreme Court itself directly confronted the issue of whether Minnesota's conflicts methodology was to be applied to procedural, as well as to substantive, questions.[29] In *Davis v. Furlong*,[30] Minnesota

25. *Id.* Even if Minnesota conflicts law regarding statutes of limitations had remained unchanged after *Milkovich*, it would still have been incorrect to simply assert, as the *Cuthbertson* court did, that statutes of limitations were considered procedural because Minnesota (like other jurisdictions) recognized exceptions to the procedural characterization. *See supra* note 10 and accompanying text. The Eighth Circuit made no effort to determine whether, under the tests previously used in Minnesota, the North Dakota statutory provision was substantive.

26. 509 F.2d at 226.

27. R. LEFLAR, AMERICAN CONFLICTS LAW § 121, at 288 (2d ed. 1968).

28. In Griffin v. American Motors Sales Corp., 618 F. Supp. 455, 456-57 (D. Minn. 1985), the court, without further analysis and without reference to the Minnesota Supreme Court's decision regarding the substance-procedure distinction in Davis v. Furlong, 328 N.W.2d 150 (Minn. 1983), *see infra* text accompanying note 30, relied on *Cuthbertson* to hold that statutes of limitation are procedural, making the Minnesota limitation binding without need to analyze the problem under the better-law methodology. A recent federal district court decision, in dicta, applied *Davis v. Furlong* to conclude that a North Carolina statute tolling the limitations period during a child's minority was substantive. Mason v. Spiegel, Inc., 610 F. Supp. 401, 404 n.2 (D. Minn. 1985).

29. Some scholarly writings on choice of law have erroneously cited Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974) as a case in which the Minnesota Supreme Court applied its conflicts methodology to a statute of limitations question. *See, e.g.*, RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 142 reporter's note on comment e (Draft, Apr. 15, 1986); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 32-33 & nn.148-51; Leflar, *The New Conflicts—*

plaintiffs brought an action against a Minnesota driver and a Wisconsin driver for personal injuries suffered in an automobile accident in Wisconsin. After commencing the action, the plaintiffs sought to join as a defendant the liability insurer of one of the existing defendants. The insurer appealed to the Minnesota Supreme Court the order of the trial court permitting its joinder. Wisconsin, unlike Minnesota, permits direct actions against a negligent party's insurer prior to recovery of judgment against the insured.[31]

The majority in *Davis* articulated the issue as whether the transformation of conflicts analysis under *Milkovich* should alter the historical rule that matters of procedure are governed by the law of the forum. The majority quoted from a treatise by Leflar, author of the five-factor analysis, which stated the rationale for the traditional rule that forum law controls procedural issues.[32] The *Davis* majority, however, failed to quote from the very next paragraph in the treatise, in which Leflar

---

*Limitations Act*, 35 MERCER L. REV. 461, 476 n.73 (1984). When the Minnesota Supreme Court decided *Myers*, however, the state borrowing statute was still in effect. *See supra* note 5 and accompanying text. Therefore, application of the Minnesota limitations period was compelled by the language of the statute and was not the result of applying common law conflicts methodology to the issue. The conflicts discussion in the majority opinion in *Myers* is addressed entirely to the separate issue of applicability of a Louisiana direct action statute. 302 Minn. 362-65, 255 N.W.2d at 240-42. Justice Kelly, does, in a rather confusing concurrence in *Myers*, appear to apply some of the choice-influencing considerations to the statute of limitations issue. *Id.* at 369-70, 255 N.W.2d at 244-45 (Kelly, J., concurring specially).

30. 328 N.W.2d 150 (Minn. 1983).

31. WIS. STAT. §§ 632.24, 803.04(2) (1979-80).

32. Leflar explains the traditional choice of law approach for procedural issues:

> It is traditional that a forum court always applies its own procedural rules and practices, regardless of the procedure that might be employed if the case were tried at the place where the cause of the action arose. Practical necessity requires that this be done. Procedure has to do with the available judicial machinery and its mode of operation, and it would be unthinkable for New York, in the trial of a set of facts arising from Louisiana, or California, or Ontario, to have to set up judicial machinery such as exists in the other legal entity, and operate it in the other state's fashion. If that were done, New York lawyers and judges would have to learn an entirely new set of procedural rules for each new extrastate case they tried. That would delay the conduct of judicial business and impair judicial efficiency in other ways as well. Clearly the local procedure must be employed.

R. LEFLAR, AMERICAN CONFLICTS LAW § 121, at 239 (3d ed. 1977) (footnotes omitted), *quoted in* Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983). The Minnesota Supreme Court in Culligan Soft Water Service, Inc. v. Culligan Int'l Co., 288 N.W.2d 213, 215 n.2 (Minn. 1977) cited this same section of Leflar's treatise as authority for the traditional view that the forum's law applies to

stated that although procedural questions were traditionally governed by forum law, it was his view that the choice-influencing considerations should be applied in all cases regardless of a claim that an issue was procedural.[33]

Four members of the *Davis* court dissented. Justice Todd writing for the minority noted that the consideration of "simplification of the judicial task," incorporated in the five-factor analysis, was designed to serve the purposes of the historical substance-procedure distinction.[34] He further noted the difficulty of making this distinction and the invalidity of the assumption that rules characterized as procedural do not affect substantive interests.[35] Justice Todd also quoted language from the Leflar treatise stating that rules asserted to be procedural should be subjected to the same analysis as other rules of law under the five considerations.[36]

The majority in *Davis*, by reintroducing the substance-procedure distinction, seriously undermined the integrity of Minnesota's choice of law process. The principal advantages of the Leflar method adopted in *Milkovich v. Saari*[37] are the comprehensiveness of its analytical scope and its honest articulation of the real reasons for judicial conclusions. Both of these assets are lost when the substance-procedure distinction is added. Leflar's list of five choice-influencing considerations was designed as a comprehensive accounting of the factors judges have historically used in reaching choice of law decisions.[38] The list recognizes the complexity of choice of law decisionmaking and its use requires a court to consider fully the implications of alter-

---

procedural issues. The issue in *Culligan* was whether an "actual controversy" existed to permit a declaratory judgment action.

33. "Rules asserted to be procedural for conflicts purposes ought to be analyzed, in their factual contexts, in terms of the relevant choice-influencing considerations, just as rigorously as other rules of law are analyzed in their own contexts in terms of the considerations." R. LEFLAR, AMERICAN CONFLICTS LAW § 121, at 240 (3d ed. 1977) (quoted in *Davis*, 328 N.W.2d at 154 (Todd, J., dissenting)). In the same section, Leflar also writes: "The real question ought not to be one of technical characterization, but rather one of which state's rule ought to be applied in the light of the relevant choice-influencing considerations." R. LEFLAR, *supra*, § 121, at 241.

34. *Davis*, 328 N.W.2d at 153 (Todd, J., dissenting).

35. *Id.*

36. 328 N.W.2d at 154, *quoting* R. LEFLAR, *supra* note 33, § 121, at 240.

37. 295 Minn. 155, 203 N.W.2d 408 (1973). *See supra* text accompanying notes 11-21.

38. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW, § 105 (2d ed. 1968) (summarizing the choice-influencing considerations that "have always, expressly or tacitly, underlain common law choice of law decisions").

native outcomes before reaching a conclusion. The use of a procedural categorization, on the other hand, makes the outcome of a case depend not on thorough analysis, but rather on a single bipolar inquiry which must necessarily be artificial and inaccurate.[39] Further, because the effort to categorize a legal question as substantive or procedural in the conflicts setting eludes principled analysis, the basis for the outcome must rest not on the simple label attached to the case but rather on some unexplained decisionmaking process. The absence of forthright articulation of the real reasons for a decision makes the results in future cases unpredictable and deprives the public of the confidence in the process that can be achieved by full disclosure.

The problems of the *Davis* decision are exacerbated by the failure of the Minnesota Supreme Court to explain the method that should be used to make the substance-procedure distinction. The court did not answer two critical analytical questions: (1) Will the substance-procedure distinction be applied to a general legal concept, for example, all statutes of limitations, or will each statute or legal rule require analysis within the particular factual setting? and (2) What method will be used to distinguish between substance and procedure?

Characterization might have been simplified if the court in *Davis* had directed lower Minnesota courts to categorize legal rules, generally, as substantive or procedural. If legal rules

39. The forced dichotomy between substance and procedure is particularly artificial in the context of limitations periods because such statutes simultaneously serve both substantive and procedural functions. One scholar has said that the substance-procedure distinction and a thoughtful consideration of the relevant interests are "fundamentally irreconcilable." Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L.J. 1, 10 (1976). The interest which might be categorized as procedural is the interest of the forum whose statute would bar the claim. The forum's interest is in judicial economy and the avoidance of stale claims. "[T]he assumption is that by limiting its docket to the more current disputes, the court encourages plaintiffs to act promptly, avoids the burden of weighing stale evidence, and shifts the judiciary's efforts to matters of greater urgency." *Id.* A statute that bars a defendant's claim carries a substantive policy of affording the defendant an opportunity for repose. "[I]t is thought unfair to ask defendants to respond to claims beyond a certain time because evidence and witnesses may have disappeared and because the lingering fear of belated judgments imposes too great a restraint on business." *Id.* A statute which permits the plaintiff's claim to proceed furthers an opposing policy of protecting plaintiffs by affording them a reasonable time in which to bring their actions. *Id.* at 11. Providing a longer period in which to sue can enhance the same primary policies, such as compensation or deterrence, that are advanced by the existence of the cause of action. *Id.* at 23.

were characterized generally, rather than in a specific legal and factual setting, once a rule had been classified, precedent would make that characterization predictably apply to future cases. For example, if the Minnesota Supreme Court were to hold that statutes of limitations are procedural, that characterization would be uniformly employed by lower courts. Attorneys could then advise their clients on the assumption that statutes of limitations in other cases would also be considered procedural. Unfortunately, the *Davis* majority directed that the substance-procedure distinction be applied to the unique circumstances of the case, precluding a general characterization.[40] In *Davis*, for example, the court obviously was aware that its method would require a Minnesota court to characterize a single legal rule as procedural when it came from a state which labeled it procedural, and to characterize the very same rule as substantive when it was derived from a state which labeled it substantive.[41]

The need for case-specific categorization of statutes of limitations is also suggested by the *Davis* court's view of its own decision as simply a continuation of pre-existing traditional notions of substance and procedure in choice of law. While the traditional approach categorized statutes of limitations generally as procedural and therefore governed by the law of the forum, exceptions to the rule existed which, in practice, required that the task of categorization of a statute of limitations be undertaken afresh in each case.[42]

Knowing that the substance-procedure distinction must be

40. *See Davis*, 328 N.W.2d at 152 & n.1 (characterization of the Wisconsin direct action statute as procedural).

41. The *Davis* majority observed in a footnote that Wisconsin's categorization of its direct action statute as procedural compelled such a classification in the case before it. *Id.* at 152 n.1. In a prior decision, Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974), the Minnesota Supreme Court had applied the five-factor analysis to a Louisiana direct action statute because that state's statute was classified as substantive. *Davis*, 328 N.W.2d at 152 n.2 (quoting *Meyers*, 302 Minn. at 365-68, 225 N.W.2d at 242-44).

42. *See supra* note 10. The majority in *Davis* cited two statute of limitations cases among the cases constituting the "long-settled precedent" that it was not abandoning in holding that matters of procedure and remedies were to be governed by the law of the forum. 328 N.W.2d at 153. In Weston v. Jones, 160 Minn. 32, 35, 199 N.W. 431, 432-33 (1924), the court simply stated the general proposition that remedies were governed by the law of the forum and that this rule applied to statutes of limitations. In Bond v. Pennsylvania R.R. Co., 124 Minn. 195, 144 N.W. 942 (1914), the court applied one of the exceptions to the general rule—that when a limitations period was incorporated in a statute creating the cause of action the limitation was viewed as a limitation on the right rather than on the remedy and therefore was substantive. *See also In re* Estate of Daniel, 208 Minn. 420, 427, 294 N.W. 465, 469 (1940) (demonstrating

applied each time a conflicts case arises, a court following *Davis* must still resolve the next question: What method should it use to distinguish between substance and procedure? One might have thought that a court ought to make the distinction in light of its purpose, explained by Leflar and quoted by the majority in *Davis*, of promoting judicial efficiency by making it unnecessary for courts to adopt a special legal machinery for every extrastate case.[43] If a court made the distinction in light of its purpose, one would then ask whether it would be cumbersome or inefficient for the forum to adopt the other state's rule.

The court in *Davis*, however, did not make such an inquiry. Had the court inquired whether the reason for the rule that procedural matters are governed by forum law applied to a direct action statute, it surely would have concluded that it would be neither cumbersome nor inefficient for the Minnesota court to permit the plaintiff to sue the Wisconsin defendant's insurer. Once the decision to permit joinder had been made, the task of hearing the litigation would have been no more difficult for the court than if joinder had not been allowed. Instead of engaging in such a functional analysis, however, the court determined that the direct action statute was procedural simply by examining how the other state characterized its law, without regard to the context in which that state had made the characterization.[44]

Beyond making relevant the other state's characterization of its legal rule, the majority in *Davis* left uncertain whether additional classification methods might also be employed. For example, because the *Davis* majority viewed its decision not as a departure from existing law but rather as a mere continuation of longstanding precedent and legal tradition, it may well be that the court also expected the employment of traditional methods of categorizing cases as substantive or procedural.[45]

---

the specificity of analysis in determining whether a statute of limitations limited the right or the remedy).

43. *See supra* note 32.

44. The Minnesota Supreme Court cited as authority for the proposition that the Wisconsin direct action statute was procedural the case of Miller v. Wadkins, 31 Wis. 2d 281, 142 N.W.2d 855 (1966). *Davis*, 328 N.W.2d at 152 n.1. The *Miller* case, although involving an interstate tort action, did not use the substance-procedure distinction for conflicts purposes but rather used it merely descriptively in interpreting a Wisconsin statute. The two cases on which *Miller* relied for the procedural characterization, in footnote three of the opinion, were not choice of law cases and both also used the distinction descriptively in the process of statutory interpretation. *See* Frye v. Angst, 28 Wis. 2d 575, 579, 137 N.W.2d 430, 434 (1965); Snorek v. Boyle, 18 Wis. 2d 202, 207, 118 N.W.2d 132, 135 (1962).

45. The *Davis* majority posed the issue as whether the court should over-

Following *Davis*, therefore, it appears that in each multistate case, before it is determined what statute of limitations applies, it is necessary to undertake an independent analysis of whether the statute of limitations at issue is substantive or procedural. That analysis requires ascertaining how the state of the statute's origin characterizes it as well as whether, under the peculiar traditional rules for characterizing statutes of limitations, the provision is substantive or procedural.[46] If the court finds the statute, under this analysis, to be procedural, it would apply the Minnesota limitations period. If, however, the court characterized the other state's limitations period as substantive, a further question would arise.

The additional question is whether a substantive characterization means that the other state's limitations period automatically will apply or simply that the court must then commence an entirely new analysis to determine the applicable limitations period under the five choice-influencing considerations. Given the logic of the traditional rule and the conclusion that the other state's rule is substantive, one would think that the analysis would stop at that point and the Minnesota courts would apply the other state's limitations period. The court's decision in *Davis*, however, indicates that instead of applying the other state's law upon a finding that its limitations period is substantive, the choice-influencing considerations come into play, potentially permitting the application of the forum's limitations period.[47]

---

rule longstanding precedent and cited cases dating back to 1883 standing for the "almost universal" rule that matters of procedure were governed by the law of the forum. 328 N.W.2d at 153. Among these was a case relying upon a traditional exception to the procedural treatment of statutes of limitation. *See supra* note 42.

46. To determine whether a limitations period in another state restricted the right or only the remedy, courts traditionally would examine such questions as whether the cause of action was a newly-created one, whether the cause of action was statutory, whether the limitations period was contained in the same statute or section of the statute creating the cause of action, and whether the language of the limitation appeared procedural or substantive. The examination of whether the limitations period was viewed in the other state as substantive or procedural was also part of the traditional method. *See, e.g.*, Bournias v. Atlantic Maritime Co., 220 F.2d 152, 155 (2d Cir. 1955).

47. The *Davis* court stated that analysis of the choice-influencing considerations (which it describes as the *Milkovich* method) applied to conflicts of substantive law, 328 N.W.2d at 153, and noted that in a prior case, Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974), the court appropriately applied the *Milkovich* analysis to the direct action issue after determining that Louisiana considered its direct action statute substantive. 328 N.W.2d at 152 n.2. In Mason v. Spiegel, Inc., 610 F. Supp. 401, 404 n.2 (D.

The Minnesota Supreme Court in *Davis* thus took two distinct and philosophically opposed methods for the resolution of choice of law problems (the traditional approach and the Leflar method) and required that they be used in tandem in such a way that violates basic tenets of each approach. The traditional method's predominant concern is with respect for the territorial rights of other jurisdictions. It is designed, in the case of statutes of limitations, to preclude a forum from imposing its own limitations period where the other state considered the limitations issue a fundamental part of the legal right. The traditional method would consider whether another state identified its limitations period as substantive and, if it did, would compel its application. The *Davis* method, however, simply uses that characterization as an invitation to examine whether the forum state's limitation should be applied.

The use of the traditional method to characterize questions as substantive or procedural is likewise entirely at odds with the philosophical basis of the Leflar method, which eschews technical substance-procedure distinctions and specifically attacks the bringing of substance-procedure characterizations from other legal settings into the realm of choice of law.[48] Further, by using the traditional characterization as a prelude to Leflar's method, *Davis* permits removing certain cases from comprehensive analysis simply by characterizing a statute as procedural.[49] Avoiding the Leflar analysis by a procedural

Minn. 1985), a federal district court, in dicta, after finding a North Carolina limitations period to be substantive, followed *Davis* and proceeded to apply the *Milkovich* factors to determine that the North Carolina limitations period would be applicable.

48. R. LEFLAR, AMERICAN CONFLICTS LAW § 121, at 241 (3d ed. 1977).

49. Leflar has stated: "The real question ought not to be one of technical characterization, but rather one of which state's rule ought to be applied in the light of the relevant choice-influencing considerations." *Id.* More critically, Leflar has written of the characterization process: "The pretense that the state [whose law shall govern] is chosen first by resort to some supposedly inflexible rule of conflicts law can only be described as a cover-up, and an unnecessary one, for the true, and legitimate, choice-of-law process." *Id.* § 88, at 180. Leflar's method, while eschewing the technical substance-procedure distinction, incorporates the function of the substance-procedure distinction in his third choice-influencing consideration, simplification of the judicial task. *Id.* § 105, at 209. More specifically, Leflar has written that the traditional substance-procedure distinction should not be employed in determining the applicable limitations period. "There is no inherent reason why the choice between statutes of limitations should be handled any differently than other choice-of-law problems." *Id.* § 128, at 256. For a more recent articulation by Professor Leflar of his approach to statutes of limitation, see *supra* notes 94-97 and accompanying text.

characterization also allows a judge to announce the result in a case as if it mechanically followed from the technical rule while shielding from public scrutiny the real reasons for the choice of law decision.

Quite apart from the problems of philosophical inconsistency and lack of forthrightness introduced by *Davis*, the case has at least three other unfortunate effects. First, requiring a complete analysis, at least in some cases, under two entirely different methods unnecessarily complicates the resolution of choice of law problems. Second, the complexity of the process and the opportunities for manipulation in making the substance-procedure distinction are likely to make the results in these cases unpredictable. This unpredictability is likely to grow as litigants recognize that the introduction of the procedural escape device may permit them to avoid what would otherwise be the result under the Leflar method.[50] Third, permitting a procedural characterization to assure the application of forum law is likely to encourage parties having few contacts with Minnesota to engage in forum shopping to obtain the benefit of its laws.[51]

In short, the Minnesota Supreme Court's reintroduction of the substance-procedure distinction into conflicts law undermines some of the most basic values of a choice of law system but affords no discernable benefits. The effects of *Davis v. Furlong* are particularly detrimental to the reasonable resolution of statute of limitations questions. Because *Davis* does not offer a tenable approach to limitations issues in multistate cases, it is appropriate to explore whether other options are available to the Minnesota Supreme Court or Legislature which would better resolve statute of limitations issues and which would be more compatible with Minnesota's general approach to choice of law problems. Part II of this Article considers some of these alternatives.

---

50. Lack of predictability is especially troubling with regard to limitations periods. It is vital for attorneys to know, at the outset, the amount of time which they will have to commence any litigation.

51. The possibility of gaining application of Minnesota's limitations period is particularly likely to encourage forum shopping. For some kinds of cases, Minnesota has relatively long limitations periods. For example, the limitations period for an "injury to the person or rights of another" not otherwise specified is six years. MINN. STAT. § 541.05(5) (1985). *Compare* N.J. STAT. § 2A:14-2 (1983 & Supp. 1986) (requiring that personal injury actions be commenced within two years); WIS. STAT. § 893.54 (1984) (three years to commence a personal injury action).

## II. ALTERNATIVES

The approach undertaken by the Minnesota Supreme Court, to attempt to maintain a traditional substance-procedure distinction in the midst of a modern choice of law method, has been rejected by virtually every scholar, court and legal committee which has considered the issue.[52]

Contemporary choice of law scholars, although differing significantly in the details of the analytical methods advanced to replace traditional conflicts analysis, have uniformly advocated abandonment of the traditional substance-procedure distinction.[53] Brainerd Currie, the father of the modern conflicts revolution, considered the elimination of classical characteriza-

52. Two courts have held that statutes of limitations will continue to be considered procedural and governed by forum law despite a choice of law system which otherwise uses some form of functional analysis. Both decisions, however, simply rely on precedent and fail to provide any analytical reasons for adhering to the traditional rule. In Wright v. Fireman's Fund Ins. Co., 522 F.2d 1376 (5th Cir. 1975), the Fifth Circuit felt constrained to follow Louisiana precedent regarding the traditional rule because, despite the adoption of interest analysis, the Louisiana Supreme Court had yet to hold that its new methodology would apply to statute of limitations questions. In Vick v. Cochran, 316 So. 2d 242, 246 (Miss. 1975), the Mississippi Supreme Court simply relied, without analysis, on what it described as "ancient precedent" to hold that limitations questions were governed by forum law, although the court expressed dissatisfaction with the result that permitted litigation in Mississippi between Alabama parties which would have been foreclosed by both the Alabama statute of limitations and the Alabama guest statute.

Professor Weintraub's treatise cites additional cases as holding that a state's reformed choice of law method will not affect the procedural characterization of limitation periods. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2C2, at 59-60 n.57 (3d ed. 1986). The Minnesota case from the Eighth Circuit cited by Professor Weintraub, Cuthbertson v. Uhley, 509 F.2d 225 (8th Cir. 1975), is discussed in the text accompanying *supra* notes 22-26. The other cases cited by Professor Weintraub have either been contradicted by subsequent decisions in the jurisdiction or do not support the proposition for which they are cited.

The only arguable support for the proposition in the scholarly literature appears as an aside in Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 209-10 (1982). Professor Risinger suggests that, within a functional analysis, one should determine, with respect to each statute of limitations, whether the legislature intended to close only its courts or to preclude access to all courts. *Id.* Even Professor Risinger, however, concludes that if this examination of legislative intent were made it would probably reveal that legislators intended their limitations to be applicable elsewhere, in contradition to the historical presumption that such statutes are procedural. *Id.* at 210.

53. In addition to the scholars discussed in the text in this paragraph, see also Grossman, *supra* note 29, at 15-19; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws,* 19 WASHBURN L.J. 405 (1980); Reese, *The*

tion problems, which he described as "wholly artificial," to be a significant by-product of his new choice of law method.[54] Russell Weintraub recommends that any question that might affect the outcome of litigation be treated to full conflicts analysis regardless of any traditional characterization of the issue as procedural.[55] Applying the outcome-determinative criterion to statutes of limitation specifically, Weintraub concludes that such statutes should always be subjected to complete functional choice of law analysis.[56] Gary Milhollin, in a frequently cited article exploring the history and current treatment of statutes of limitation in choice of law, found that "interest analysis and the distinction between substance and procedure are fundamentally irreconcilable."[57] Robert Leflar, who articulated the conflicts methodology adopted in Minnesota, takes a position entirely consistent with these other scholars in insisting upon rigorous analysis of all issues regardless of an assertion that the issue is procedural.[58] Leflar also specifically directs that limitations issues be tested identically with other choice of law issues, despite their historic procedural characterization.[59]

Minnesota's retention of the substance-procedure distinction in the midst of a reformed choice of law method is also inconsistent with the conclusion of most courts that have determined the role of procedural characterizations in a modern choice of law method.[60] For example, under the law of the State of Washington, which follows the state contacts and governmental interests approach of the Second Restatement of Conflicts,[61] that approach is used to resolve not only issues historically considered as substantive, but also matters previously characterized as procedural, such as statutes of limitation.[62] In New Jersey, where governmental interest analysis is used to resolve conflicts issues, that method is also used to decide histori-

---

*Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 505-07 (1983).

54. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 184 (1963).

55. R. WEINTRAUB, *supra* note 52, § 3.2C1, at 53.

56. *Id.* § 3.2C2, at 59.

57. Milhollin, *supra* note 39, at 10.

58. R. LEFLAR, AMERICAN CONFLICTS LAW § 121, at 240 (3d ed. 1977).

59. *Id.* § 127, at 256. *See supra* text accompanying notes 48-49.

60. See authorities cited in R. WEINTRAUB, *supra* note 52, § 3.2C2, at 59-60 n.57.

61. Johnson v. Spider Staging Corp., 87 Wash. 2d 577, 580, 555 P.2d 997, 1000 (1976) (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971) to a tort choice of law problem).

62. Tomlin v. Boeing Co., 650 F.2d 1065 (9th Cir. 1981) (applying Washington law).

cally procedural questions, such as statutes of limitations.[63]

The two other states that, like Minnesota, use Leflar's choice-influencing considerations also apply that method when confronted with a conflict on a limitations question.[64] In New Hampshire, before the adoption of Leflar's method, possible conflicts in limitations periods were resolved according to the traditional rules, which required a substance-procedure characterization.[65] Once New Hampshire courts adopted the Leflar method, however, a federal court interpreting New Hampshire law concluded that that adoption implicitly overruled the traditional precedent and required application of the Leflar method to resolve a conflict in limitations statutes.[66] Wisconsin, the third Leflar jurisdiction, has reached the same conclusion. There, a state trial court had held that despite the Wisconsin Supreme Court's general rejection of the traditional choice of law method, limitations questions should still be governed by the law of the forum.[67] The Wisconsin Supreme Court reversed, and applied the five choice-influencing considerations to

63. Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 32 (3d Cir. 1975) (applying New Jersey law); Heavner v. Uniroyal, Inc., 63 N.J. 130, 141, 305 A.2d 412, 418 (1973).

64. It is unclear whether Arkansas may be counted among the states that use Leflar's method. The Arkansas Supreme Court has listed the five choice-influencing considerations in some of its opinions, but it has not seemed actually to employ them in reaching its conclusions. *See,* Williams v. Carr, 263 Ark. 326, 333, 565 S.W.2d 400, 403-04 (1978); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 628-29, 632, 550 S.W.2d 453, 456, 458 (1977). Moreover, the Arkansas Supreme Court has described its own approach as a search for the state with the "most significant relationship." *Williams*, 263 Ark. at 333, 565 S.W.2d at 403-04. Professor Kay, in her survey of different states and their choice of law methods, relied on these cases in concluding that Arkansas combines the Leflar approach with other theories. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Mercer L. Rev. 521, 568 (1983). A federal court, seeking to determine what choice of law rule Arkansas would use in a contracts case, concluded that *Wallis* had applied the "most significant relationship" test of the Restatement (Second) of Conflicts. Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 994 (11th Cir. 1982). In any case, Arkansas does not appear to have been faced with the question of what method will be used to resolve conflicts in limitations periods between 1977, when it rejected lex loci in *Wallis*, and 1985 when the Arkansas Legislature adopted the Uniform Conflict of Laws-Limitations Act. Ark. Stat. Ann. §§ 37-301 to 307 (Supp. 1985). For a discussion of the uniform act see *infra* notes 82-87 and accompanying text.

65. Dupuis v. Woodward, 97 N.H. 351, 88 A.2d 177 (1952).

66. Dindo v. Whitney, 429 F.2d 25 (1st Cir. 1970) (applying New Hampshire law), *remanded*, 52 F.R.D. 194 (D.N.H. 1971), *vacated on other grounds*, 451 F.2d 1 (1st Cir. 1971).

67. Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 201, 206 N.W.2d 414, 418 (1973).

resolve the limitations issue.[68]

Thus, Minnesota stands alone among jurisdictions that utilize the Leflar method in thinking that a traditional substance-procedure distinction can coexist with an approach which otherwise decides conflicts cases in light of choice-influencing considerations.

The question of how limitations periods should be handled in modernized choice of law systems has also recently been the focus of the work of committees of distinguished members of the legal profession. In 1982, the National Conference of Commissioners on Uniform State Laws reconsidered its approach to statutes of limitations and promulgated a new uniform act to reflect its conclusion that "limitations laws should be deemed substantive in character, like other laws that affect the existence of the cause of action."[69] In 1986, an American Law Institute Committee proposed revisions to the Second Restatement of Conflicts regarding limitations issues. The changes were designed to conform the Second Restatement to what the drafters referred to as the "emerging trend" that "courts select the state whose law will be applied to the issue of limitations by a process essentially similar to that used in the case of other issues of choice of law."[70]

In sum, the method of the Minnesota Supreme Court, which retains a traditional substance-procedure distinction and permits removal of questions such as limitations periods from the analysis to which conflicts issues are otherwise subjected, has been uniformly rejected by a chorus of legal opinion. Scholars, courts and professional committees have rejected the traditional approach because it creates the same problems of complexity, lack of predictability, lack of forthrightness, forum shopping and inconsistency for which the Minnesota approach was criticized in Part I of this Article.

To say that the substance-procedure distinction should be rejected, however, does not fully answer the question of how Minnesota should deal with limitations problems. Those who have promoted rejection of the traditional substance-procedure dichotomy have proposed two different candidates for its replacement. Some have proposed that states apply their re-

68. *Id.* at 202, 206 N.W.2d at 419.

69. UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT prefatory note, 12 U.L.A. 48 (Supp. 1986).

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 comment e (Draft, Apr. 15, 1986).

formed conflicts methodology directly to the question of limitations, analyzing it just like any other issue in a case. Others have suggested that the limitations problem be handled indirectly by using the limitations period of the jurisdiction whose law is determined to govern the other issues in the case.

The proposal to analyze limitations issues directly has had a number of proponents, including Milhollin,[71] Weintraub,[72] and the new proposed revision to the Second Restatement of Conflicts.[73] The Second Restatement had initially conformed to the traditional rule of normally treating statutes of limitations as procedural and governed by the law of the forum.[74] The American Law Institute has now substituted an entirely new rule to govern limitations periods in conflicts that provides:

> § 142 Statute of Limitations
>
> An action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more

71. "Given the basic premise of interest analysis, that solutions to choice of law problems can be rational only upon consideration of the relevant governmental policies, it seems logical to treat conflicts between statutes of limitation the same as conflicts between other rules of law." Milhollin, *supra* note 39, at 18.

72. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2C2, at 66 (3d ed. 1986). Weintraub finds the new Uniform Act, which treats statutes of limitation indirectly, as an improvement but "not as good . . . as no act at all." He argues that courts should be free "to give limitations the independent functional conflicts analysis that they require." *Id.* Although Weintraub expresses a preference for the direct approach over the indirect approach, he does not provide an adequate rationale for rejecting the indirect approach. The only case he cites in which the state whose law was chosen to govern substantive matters was not an appropriate source for the limitations period was Schum v. Bailey, 578 F.2d 493 (3d Cir. 1978). R. WEINTRAUB, *supra*, § 3.2C2, at 65-66. In *Schum*, the court applied New Jersey, rather than New York law, to an issue of tort liability without undertaking any conflicts analysis because the tort liability law of the two states was the same. It then applied the New Jersey limitations law to bar the action because New Jersey's tort law was controlling. *Schum* hardly stands for the broad proposition that the indirect method reaches inappropriate results. It more narrowly indicates that the indirect method of deciding limitations issues depends on a complete conflicts analysis of the other substantive issues.

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (Draft, Apr. 15, 1986). The proposed revisions to § 142 were approved by the American Law Institute at its meeting in May, 1986. 54 U.S.L.W. 2597 (May 27, 1986). Editorial amendments to the draft, which would not affect its substance, are expected to be made prior to final issuance. Telephone conversation with Professor Maurice Rosenberg (Aug. 12, 1986).

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1969).

significant relationship to the parties and the occurrence.[75]

The comments to the new Section 142 indicate how the drafters intend the section to be applied. They note that because a basic purpose of a limitations period is to protect local courts from stale claims, a state will have a substantial interest in preventing litigation that it considers stale. The drafters conclude, therefore, that, "subject to rare exceptions, the forum will dismiss an action that is barred by its statute of limitations."[76]

The comments suggest three of those "rare exceptions" in which a court might entertain an action which would be barred under the forum's limitations period. First, a forum could hear the case if it fears that dismissal would be unjust to the plaintiff, such as where, through no fault of the plaintiff, no alternative forum is available. Second, the forum could entertain the action if suit in an alternative jurisdiction would be extremely inconvenient, if the forum bears some relationship to the parties or the occurrence, and if there is a relatively small difference between the length of the limitations periods in the forum and the other state. Third, if the forum can determine that its limitations period does not reflect a concern for protection of local courts, but rather a desire only to limit litigation involving local persons or events, another state's longer period could be applied in a case involving only out-of-state parties and events.[77]

The most substantial change in the Second Restatement involves its treatment of cases in which the forum's statute of limitations is longer than that of the other state. Previously, the forum was free to entertain the action unless the other state's limitations period was considered to bar the right and not just the remedy.[78] The drafters now acknowledge the inconsistency between such a rule and its functional approach to legal issues.[79] Accordingly, the Second Restatement will now permit the forum to hear the action under its longer limitations period only if it would "advance a substantial forum interest and would not seriously impinge upon the interests of other

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (Draft, Apr. 15, 1986).

76. *Id.* § 142 comment f.

77. Even in this case, however, the draft cautions that, to preclude litigation of stale claims, suit should only be permitted if there is no substantial difference in the length of the two jurisdictions' limitations periods. *Id.*

78. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142(2), 143 (1969).

79. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 comment g (Draft, Apr. 15, 1986).

states."[80] Unfortunately, neither the language of Section 142 nor its comments provide any helpful guidance for resolving the direct conflict of interests which occurs when the plaintiff is domiciled in the forum with a longer statute of limitations period and the defendant claims the protection of the shorter period in its home state.[81]

While the Second Restatement draft and scholars such as Milhollin and Weintraub[82] call for a direct and independent functional analysis of the limitations issue, the National Conference of Commissioners on Uniform State Laws recommends handling limitations questions indirectly. The 1982 Uniform Conflict of Laws-Limitations Act states that, except for situations of substantial unfairness, the following rules apply:

> (a) [I]f a claim is substantively based:
> (1) upon the law of one other state, the limitation period of that state applies; or
> (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State, applies.
> (b) The limitation period of this State applies to all other claims.[83]

---

80. *Id.* The comment further explains that hearing the action could advance a substantial forum interest if either the law of the forum would provide the rules of decision for other issues in the case or if the parties are both domiciliaries of the forum state.

81. *See id.* Comment g would permit the forum with the longer limitations period to hear the case if the plaintiff (but not the defendant) is domiciled in the forum state, but only if the court "is convinced that doing so would further a substantial local interest." This comment does not explain whether a greater forum interest is required for the use of the forum's longer statute when only the plaintiff resides in the forum because regardless of whether it is merely the plaintiff or both parties who are domiciled in the forum, the comment calls uniformly for a "substantial local interest." *Id.*

82. *See supra* notes 71-73 and accompanying text.

83. UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2, 12 U.L.A. 49 (Supp. 1986). The escape clause is contained in § 4 of the Uniform Act and provides:

> If the court determines that the limitation period of another state applicable under Sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this State applies.

*Id.* at § 4, 12 U.L.A. 50. The comments provide an example of the circumstances which might justify application of the unfairness exception. The comment to § 3 of the Uniform Act, which applies the rule of § 2 to accrual and tolling provisions, describes as unfair a state which "tolls the running of its limitation period because of a defendant's physical absence from the state even though he is at all times subject to service under a longarm statute." *Id.* at § 3 comment, 12 U.L.A. 50. Professor Leflar, a member of the committee which drafted the Uniform Act, provides as an additional example of unfairness under § 4 the accrual rules of a state that would permit a limitations period to

The Uniform Conflict of Laws-Limitations Act already has been adopted in four states.[84] In states where the Act is in effect, courts initially need only determine the law which would govern the substantive issues in the case and then, derivatively, apply the limitations period for that state to the litigation.

The Second Restatement's direct and the Uniform Act's indirect methods for determining the applicable limitations period appear at first to be mutually exclusive. The methods might not, however, be quite so different in application. Although the black letter rule of the Second Restatement calls on the decisionmaker to determine which state has the most significant relationship "with respect to the issue of limitations," the comments describe an analysis that makes the law governing other issues in the litigation often critical to the result. For example, comment f requires consideration of whether the forum has the "most significant relationship to the other important issues in the case" to decide if the forum's shorter limitation will foreclose litigation that would be extremely inconvenient for the plaintiff to bring elsewhere.[85] Similarly, where the forum is trying to decide whether to apply its longer limitations period to permit an action which would be barred elsewhere, a critical determination under the Second Restatement is again whether the forum has the "most significant relationship to other important issues in the case."[86]

The Uniform Act also would employ somewhat of a mixture of direct and indirect analysis. The Uniform Act's primary provision indirectly treats the limitations issue by tying it to the law that governs other issues in the case if that is the law of one other state. In cases where the substantive law is derived from more than one state, however, the Uniform Act incorporates the forum state's choice of law method to select which state's limitations period will control.[87] The comments to the Uniform Act suggest that its drafters expect that a court using a modern choice of law approach will employ that approach di-

---

begin running at the time the tort occurred even though the victim could not have known of the harmful consequences until some time later, perhaps after the limitations period had expired. Leflar, *supra* note 29, at 480.

84. ARK. STAT. ANN. §§ 37-301 to 307 (Supp. 1985); COLO. REV. STAT. §§ 13-82-101 to 107 (Supp. 1985); N.D. CENT. CODE §§ 28-01.2-01 to 2-05 (Supp. 1985); WASH. REV. CODE ANN. §§ 4.18.010 to .904 (Supp. 1986).

85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 comment f (Draft, Apr. 15, 1986).

86. *Id.* at § 142 comment g.

87. UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2(a)(2), 12 U.L.A. 49 (Supp. 1986).

rectly to select the applicable limitations period when more than one state's law governs substantive issues in the case.[88]

This survey of the alternatives available to the Minnesota Supreme Court for the handling of conflicts in limitations periods has strongly favored the abandonment of the substance-procedure distinction. Alternatives to replace the current system have also been presented: the Second Restatement, which emphasizes a direct analysis of limitations questions; and the Uniform Act, which generally prefers an indirect analytical method. Part III of this Article suggests how Minnesota might choose between them in adopting a new method for resolving statutes of limitations conflicts.

## III. A RECOMMENDED APPROACH

If Minnesota were to reject the substance-procedure distinction, which of the alternatives should it choose? The approach of the Second Restatement? Or that of the Uniform Act? Comparison of the two approaches, in the context of Minnesota's maintenance of the Leflar method for resolution of choice of law problems, indicates that Minnesota should adopt the Uniform Act as a means to resolve conflicts in statutes of limitations.[89]

One of the problems with Minnesota's current use of both the traditional substance-procedure distinction and Leflar's choice-influencing considerations is the incompatibility of the two approaches.[90] This problem would continue if the Restatement were selected but would be resolved by adoption of the Uniform Act. The Restatement makes statutes of limitations depend on identification of the state which has the "more sig-

88. *See id.* at § 2 comment, 12 U.L.A. 49. More generally, although the Uniform Act largely connects statutes of limitations to other governing substantive law, Professor Leflar describes the Act as responsive to a functional analysis of the policies of limitations periods. Leflar, *supra* note 29, at 468-74.

89. Although the other two states that also use the Leflar method, Wisconsin and New Hampshire, have applied its analysis to statutes of limitations using the direct approach, in neither state was there an opportunity to consider the alternative indirect approach because the cases in those states were decided before promulgation of the Uniform Conflict of Laws-Limitations Act and prior to Professor Leflar's statement of the suitability of the Uniform Act's indirect approach to his choice-influencing considerations. Dindo v. Whitney, 429 F.2d 25 (1st Cir. 1970) (applying New Hampshire law); Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973); Leflar, *supra* note 29, at 468-74.

90. *See supra* text following note 47; text accompanying note 48.

nificant relationship with respect to the issue of limitations."[91] The concept of a "significant relationship," although central to the Second Restatement, is foreign to Minnesota choice of law. Resolving limitations questions under the Second Restatement would sometimes require determining the state with the most significant relationship to other issues in the case.[92] In a state such as Minnesota, which does not use the Second Restatement for resolution of other issues, the Second Restatement approach would unnecessarily complicate its analysis and possibly result in inconsistencies. Trying to combine the two methods, for example, might require a Minnesota court to find the state with the more significant relationship to the question of limitations and the state with the most significant relationship to various other issues in the case. The court would then have to identify, using choice-influencing considerations, the appropriate law for several issues, only possibly to discover that, on some issues, the two methods select different state Laws to govern. The limitations approach of the Second Restatement is designed to operate efficiently and consistently only in a jurisdiction which uses that method to resolve other conflicts problems. Neither efficiency nor consistency could therefore be achieved in Minnesota by adopting the Second Restatement approach to limitations.

The Uniform Act, on the other hand, would be both efficient to apply and consistent philosophically with Minnesota's choice-influencing considerations. Identification of the governing limitations period under the Uniform Act would, in most cases, not require any separate analysis. A court would identify the governing law under the usual Leflar method and then simply use that state's law to control limitations questions. Even when a Minnesota court would have to make a separate limitations analysis, as in a case where the law of two or more states would apply to other issues, it could do so under the familiar method that it applied to the other issues in the case. The Uniform Act, unlike the Restatement, was explicitly designed to be compatible with any state's choice of law method, regardless of the nature of that state's method.[93]

Leflar's enthusiastic support for the Uniform Act is addi-

91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (Draft, Apr. 15, 1986).

92. *See supra* text accompanying notes 85-86.

93. UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT § 2 comment, 12 U.L.A. 49 (Supp. 1986).

tional strong evidence of the compatibility of the Act to analysis under choice-influencing considerations. Although Leflar earlier had advocated the direct analysis of statute of limitations issues under his five choice-influencing considerations,[94] his views later changed. Leflar served as a member of the committee that drafted the Uniform Act.[95] In a recent article, he employed his choice-influencing considerations to study the question of limitations and concluded that the Uniform Act was well suited to resolve limitations disputes in light of these considerations.[96] Leflar specifically endorsed the indirect approach of the Uniform Act, arguing that other approaches that treat limitations as a completely separate issue are wrong because the limitations issue "exists and has meaning only as it relates to the other issues in that case."[97]

The Uniform Act has other advantages over the Second Restatement, apart from consistency and simplicity. The Uniform Act provides a better method for the resolution of "true conflict" problems—those in which the interests of two states are in direct conflict. As noted earlier, the Second Restatement provides little help for resolving a case in which the plaintiff is domiciled in the forum with a longer limitations period while the defendant is a domiciliary of a jurisdiction whose limitations period has expired.[98] The Uniform Act would much more easily resolve the problem by applying the limitations period of the state whose law would govern other substantive issues in the case.

Further, the Second Restatement's complex method for resolving limitations problems is likely to cause uncertainty. As noted, a Minnesota court attempting to follow its directives would have to identify not only the state with the more significant relationship to the question of limitations but also, in many cases, the state with the most significant relationship to other issues in the case.[99] Likewise, the Second Restatement's inability to provide a clear answer to the true conflict problem creates additional uncertainty[100] and, therefore, less predictable results than the Uniform Act. Predictability is an important value generally in conflicts and it is particularly important with

94. *See supra* note 33 and accompanying text.
95. Leflar, *supra* note 29, at 465 n.35.
96. *Id.* at 471-74.
97. *Id.* at 475-76.
98. *See supra* note 81 and accompanying text.
99. *See supra* notes 85-86 and accompanying text.
100. *See supra* note 81 and accompanying text.

respect to limitations periods.[101] Attorneys for the parties need to know, soon after a claim arises, what limitations period is applicable.[102] Although all conflicts methods retain some inherent unpredictabilty, the Uniform Act reduces this danger because under it all published state appellate court decisions on choice of law provide guidance on limitations questions, rather than just the few or nonexistent decisions specifically dealing with statutes of limitations.[103]

Critics of the traditional approach to statutes of limitations conflicts problems considered encouragement of forum shopping to be one of its serious defects.[104] Under the traditional approach, which generally characterized limitations periods as procedural, a plaintiff whose action was barred in all of the states with any legitimate connection to the case could still get its case heard in a jurisdiction that had an unexpired limitations period that the forum labeled as procedural. The Second Restatement rule on limitations would still permit such forum shopping because it allows the forum to explore whether it has any interests in the case which would make it the state with the more significant relationship to the question of limitations. Under the Uniform Act, however, forum shopping is reduced because the courts apply to the limitations issue the law of a state whose law also would govern the other substantive issues.

Another criticism of the substance-procedure distinction as applied to statutes of limitations was its artificiality and the concomitant likelihood of the court's actual reasoning being

101. Fairness demands that there be predictability in the conflicts limitation area, particularly when delays are likely to ensue. Attorneys must know at the claim's inception the duration of their client's rights and the legal consequences of their inaction. Furthermore, if parties know which state's limitations period applies, forum shopping is less of a concern. *See* Milhollin, *supra* note 39, at 10; Leflar, *supra* note 29, at 472.

102. Professor Leflar ranks the Uniform Act high on the consideration of predictability of results.

> One state whose law is relevant and can reasonably be known in advance is the state upon whose substantive law the claim is based. The limitations laws of some other states may be available, but those of the substantively governing state surely are, and its relevance outranks all others. For tolerable predictability when predictability is needed, its law is the best.

*Id.*

103. For example, in Minnesota today there are no published state court decisions on statute of limitations in conflicts cases since the repeal of the Minnesota borrowing statute in 1977. The borrowing statute and its repeal are discussed *supra* at notes 1-7 and accompanying text.

104. *See, e.g.*, Grossman, *supra* note 29, at 16; Martin, *supra* note 53, at 414.

hidden behind abstract labeling.[105] These dangers are also present in the Second Restatement which requires that courts resolve limitations conflicts in large part on the basis of the legislative rationale for a specific limitations period.[106] Because limitations periods are likely to have multiple purposes,[107] and because state legislative histories are largely unavailable, the Second Restatement's method is an invitation to courts selectively to identify the purposes reflected in limitations periods to achieve desired results without having to articulate just why it is that those results are desired.[108]

Finally, the form of the Uniform Act, as a statute designed for nationally uniform adoption, can provide two additional benefits not available under the Second Restatement. First, the statutory form of the Uniform Act will make Minnesota law easier to find. Common law conflicts research is notoriously difficult, in part because of the lack of any single key number for conflicts under the West Publishing Company's indexing system.[109] The adoption of the Uniform Act would enable attorneys easily to find the Act and the relevant case law interpreting it within the annotated statutes. Second, because the National Conference of Commissioners on Uniform State Laws proposed that all states adopt the Uniform Act, the statute may gain broad national acceptance. This would promote greater national uniformity in choice of law, an area where uniformity has long been desired but has, so far, proved elusive.[110]

In summary, the Uniform Conflict of Laws-Limitations Act would provide a much better resolution of the statutes of limi-

105. *See supra* notes 37-39, 54 and accompanying text.

106. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 comment f (Draft, Apr. 15, 1986).

107. *See supra* note 39 and accompanying text.

108. Clearly, the method of resolving limitations issues indirectly by identifying the governing substantive law would also require, under the choice-influencing considerations, discerning the interests promoted by the laws of the relevant states. This analysis, however, would look for the policies reflected in substantive tort, property or contract doctrines, for example. Such policies are much more easily ascertained than those behind a particular state's particular limitations period.

109. The problem is not overcome by computer searches because the key words in conflicts cases, such as "conflict" or "choice [of] law," are words in such common usage that large numbers of cases unrelated to conflicts are discovered by computer searches.

110. *See* Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983), in which the author's survey of choice of law methods currently in use in the United States finds six methods in forty-five states and another six states using combinations of those methods.

tations problem in Minnesota choice of law than would the rule of the Second Restatement.

## IV. CONCLUSION

This Article has described current Minnesota law governing statutes of limitations in choice of law in the wake of the Minnesota Supreme Court's adoption of the methodology of choice-influencing considerations and the legislature's repeal of the borrowing statute. This review has demonstrated that substantial problems have resulted from the Minnesota Supreme Court's reintroduction of the traditional substance-procedure distinction into conflicts analysis. The Minnesota Supreme Court should overrule the case of *Davis v. Furlong*,[111] which renewed that distinction. In addition, the Minnesota Legislature should enact the Uniform Conflict of Laws-Limitations Act, which determines limitations issues by following the law of the state whose laws govern other substantive issues in the case. Until enactment of the Uniform Act, the Minnesota Supreme Court should adopt, as a matter of common law, the principle of the Uniform Act that the state whose law governs other issues will also control limitations periods.

111. 328 N.W.2d 150 (Minn. 1983). *See supra* notes 30-36 and accompanying text.